IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED :8-3-2002

CORAM

THE HONOURABLE MR.JUSTICE M.CHOCKALINGAM

SECOND APPEAL NO.684 of 1992 and CMP NO.6547 of 1992

M.Parthasarathy .. Petitioner

-vs-

1.Adilakshmiammal
2.R.Krishnamurthi
3.R.Jagadeesan
4.R.Vinayagam .. Respondents

This Second Appeal is preferred under S.100 of Code of Civil Procedure against the judgment and decree of the learned III Additional City Civil Judge, Madras dated 24.3.1992 and made in A.S.No.321 of 1991 reversing the judgment of the learned II Assistant City Civil Judge, Madras, dated 5.7.1991 and made in O.S.No.1964 of 1985.

! For Petitioner : Mr.T.R.Rajagopalan,
Senior Counsel
for Mr.T.R.Rajaraman

^ For Respondents : Mr.T.Mani,
Senior Counsel
for Mr.N.Jothi

: JUDGMENT
This Second Appeal has arisen from the judgment and decree of the learned III Additional City Civil Judge, Madras setting aside the judgment and decree of the learned II Assistant City Civil Judge, Madras and granting a decree in favour of the plaintiffs.
2. The plaintiffs are the respondents herein. The plaintiffs alleged in the plaint as follows:
One late Baggiammal, wife of late Arumuga Naicker purchased the suit property on 5.5.1937. She was also known as Angammal. Though the said couple had a happy married life, they were issueless. After the death of Baggiammal, the property devolved upon her husband Arumuga Naicker. Arumuga Naicker made a settlement deed dated 7.8.1954. The said settlement has several covenants. Before the plaintiffs could proceed with these covenants, it is submitted that it was necessitated to have a settlement of this nature to the settlee because the defendant was the only male member available to the family of Arumuga Naicker as well as Munusamy Naicker. One Dedammal, mother of the defendant

and the first plaintiff was none else than the sister of the settlee Arumuga Naicker. The stipulation made in the settlement has got a special feature. Under the settlement deed the suit property was valued to the extent of Rs.1,000/-, and the defendant was directed to pay Rs.500/- to each of his sisters viz. the first plaintiff Amirthavalli Thayarammal and Pushpavalli Ammal. The settlement was created by the person during his last days by imposing such a pious obligation on the part of the defendant. The defendant was not only failed in paying the amount to the first plaintiff, but also expressed that the suit property can be managed and enjoyed by the first plaintiff herein. The defendant was also not interested in the property in view of his burden to pay money and also due to his continuous stay at Bangalore. Since the defendant did not pay the money, the plaintiffs started enjoying the suit property as that of their own, without any interruption of any one. The suit properties were the house plots adjacent to the plaintiffs' property. The plaintiffs used to enjoy the property at least from 7.8.1954. The plaintiffs were in complete enjoyment of the suit property for more than the statutory period prescribed so as to acquire the property by adverse possession. They utilised the schedule mentioned property for the purpose of their business for more than thirty years. Apart from that, it was made use by the third plaintiff to keep his raw materials at the suit property by making a pucca shed. A permanent watchman was also posted at the site. There was a fencing and thatched shed. They were in complete control and enjoyment of the suit property. As the defendant failed to pay the money as per the settlement deed, the plaintiffs continued to enjoy the suit property for the past 30 years. The plaintiffs were paying the connected taxes for the suit property. Since the defendant started interfering with the enjoyment of the property by the plaintiffs, there arose a necessity to file a suit.

3. The defendant, who is the appellant herein, filed a written statement with the following averments.

The settlement deed was made by Arumuga Naicker in favour of the defendant. Arumuga Naicker brought up the defendant from childhood. Arumuga Naicker was taken care of by the defendant. The first plaintiff was paid the amount, as stipulated in the settlement deed, and the same was acknowledged by a stamped receipt. The defendant never expressed his feeling that the suit property can be managed and enjoyed by the first plaintiff. The first plaintiff, being the sister of the defendant was asked to look after the suit property from any trespass or making any nuisance in the property. As per the settlement deed, the defendant was enjoying the suit property as absolute owner by paying the Corporation tax and urban land tax. He wanted to construct a building, and for the same, a plan was sanctioned in the year 1982. Due to his wife's brain tumour operation, he could not proceed further. A portion of the property was sold by him to Mrs.Nagamani Ammal in 1963, and the sale deed was witnessed by Mr.M.S.Raju, husband of the first plaintiff. The plaintiffs 2 to 6 were never allowed to enjoy the property. No body was allowed to enjoy the property, but the first plaintiff being his sister living next to his property was asked to look after the same. The defendant was in possession and enjoyment of the suit property from the date of settlement. The plaintiffs were neither enjoying the property nor allowed to enjoy the same. Till today, the defendant was in possession and enjoyment of the property. Since he was in Bangalore, the plaintiffs invented a story for the suit. In order to celebrate his daughter's marriage and to attend his ailing

wife, he wanted to sell the property, and informed the same to the first plaintiff and other relatives. The plaintiffs informed him that they would arrange for sale for good price. He agreed to the same and informed them to get good buyers. Later, the fifth plaintiff wrote a letter to the defendant stating that he is willing to buy the property for himself, and if not, he would arrange to get it sold at good price. The plaintiffs approached the defendant personally and expressed that they would buy for themselves. When the defendant expressed his willingness to sell the same at the prevailing rate of market price, the plaintiffs offered for nominal price, for which he declined. When the first plaintiff's son Mr.R.Venkatesan constructed his house in the first floor with the defendant's permission in March 1985, some building materials were kept temporarily till the construction was over. The plaintiffs were never enjoying the property. The taxes were paid by the defendant. Plea of adverse possession can at least be pleaded as defence, and the same may not be available to have plaintiffs' title declared on the basis of adverse possession. Since the plaintiffs could not get the land for lesser price, they invented a story and filed a vexatious suit. They want to drag on the proceedings. They have no case. Hence the suit was liable to be dismissed with costs.

4. On the above pleadings, the trial court framed necessary issues, tried the suit and dismissed the same. Aggrieved over the judgment and decree of the trial court, the plaintiffs preferred an appeal in A.S.No.321 of 1991. The learned III Additional City Civil Judge, after hearing the submissions of both sides, set aside the judgment and decree of the trial court, and decreed the suit as prayed for. Aggrieved defendant has brought forth this second appeal.

5. At the time of admission, the following substantial questions of law were formulated by this Court for consideration:

1)Is not the statement in the judgment of the Trial Court that both the parties were heard is conclusive and can the plaintiffs be allowed to contravert the said statement without filing review before the same Judge and if the learned District Judge right in criticising the trial Court on the ground that no opportunity was given to the plaintiffs?

2)Is the learned District Judge right in rejecting Exs.B7 to B14 and B40 when there is absolutely no dispute raised as to its genuineness or its contents by the plaintiffs?

3)Is the learned District Judge right in drawing an adverse inference against the defendant for not examining plaintiffs 2 and 5 and on that ground rejecting Exs.B7 to B14 and B40?

4)Is the learned District Judge right in holding that the plaintiffs have acquired title by adverse possession when the plaintiffs had not let in any evidence to prove that they had at any point of time claim title adversely to that of the defendant by any hostile act?

5.The learned District Judge having rejected the case of the plaintiffs that Rs.500/- was not paid to the 1st plaintiff as per the recital and Ex.B1 right in holding that plaintiffs had acquired by adverse possession?

6.Having regard to the specific finding given by the learned District Judge in para 11 of his judgment, is the learned District Judge right in upholding the title of the plaintiffs by adverse possession?

6. As seen above, the respondents herein filed a suit for declaration

that they prescribed the title to the suit property by way of an adverse possession and for consequential permanent injunction. On contest, the trial court agreeing with the defendant's case, dismissed the suit. On appeal therefrom, the judgment of the trial court was reversed and the suit was decreed, which has culminated in this second appeal.

7. Arguing for the appellant, the learned Senior Counsel Mr.T.R. Rajagopalan would submit that the first appellate court was not correct in holding that the plaintiffs have acquired title by adverse possession, since there was no proof in that regard; that it is pertinent to note that the trial court has agreed with the appellant's case that under Ex.B1 the defendant has acquired valid title to the suit property and has acted as per the directions given in the settlement deed by paying Rs.500/- to his sisters under Exs.B2 to B4, and hence under such circumstances, the first appellate court should not have held that the defendant lost his title by adverse possession; that the appellant has well established the payment of urban land tax and property tax as per Exs.B15 to B39 from 7.6.1960, which would indicate that he was always exercising his right of ownership over the property; that it has to be borne in mind that the suit property was a vacant site, and hence possession would follow title; that the first appellate court has made an unwarranted and unsustainable criticism over the decision of the trial court stating that the trial court decided the matter without giving an opportunity to the plaintiffs; that a statement in the judgment as to what had taken place in the court was conclusive and should not be allowed to be contraverted by an affidavit or otherwise, and the party who was aggrieved by what he considered a wrong statement in a judgment should apply to the very same court by way of a review; that in the present case, the respondents/plaintiffs have not followed the above procedure, and therefore, the first appellate court was not correct in considering the said objection in the appeal, especially when the judgment has specifically stated that the arguments of both the plaintiffs and defendant were heard by the court; that it is not correct to state that the appellant has not proved the contents of the documents and their execution; that in the course of Exs.B9 to B14 and B40 letters written by the plaintiffs 2 and 5, they have admitted the title of the defendant to the suit property; that the defendant has produced those letters and has given clear evidence that they were written by the plaintiffs 2 and 5; that it is pertinent to note that those letters or the handwritings of the plaintiffs 2 and 5 was not denied by the plaintiffs, and under such circumstances, the first appellate court was not correct in drawing an adverse inference against the defendant for not examining the plaintiffs 2 and 5 to prove the document; that there arose no necessity to examine the plaintiffs 2 and 5 on the side of the defendant, since the plaintiffs never disputed the title of the defendant; that the respondents did not raise any objection as to the proof of the contents of those letters either in the course of the trial or no ground was raised even in the memorandum of the first appeal; that it has to be pointed out that there was absolutely no dispute raised by the plaintiffs either at the time of marking of those documents or at later point of time; and that the first appellate court should not have relied on the decisions reported in 1975 MADRAS 257 and 1978 MADRAS 78 as the facts in those cases clearly disclose that they have no application to the facts of the present case.

8. Added further, the learned Senior Counsel that though the first appellate court has rightly held that the plaintiffs would have to establish

that they had acquired title by adverse possession, it has not strictly followed the principles governing the law of adverse possession while deciding the issue; that there was absolutely no evidence adduced by the plaintiffs that they were in continuous and hostile possession for over a statutory period; that the first appellate court should not have completely ignored the admission made by the first plaintiff in her evidence, wherein she has categorically stated that she was looking after the property in view of the fact that it was owned by her own brother and that she was looking after the same for the sake of her brother; that this admission of the first plaintiff would clearly prove that the defendant had requested his sister to look after the suit property; that it was the specific stand of the defendant that he was permanently settled at Bangalore, and hence he requested his sister to look after the suit property viz. a vacant site, which was situated adjacent to the property owned by the first plaintiff, and hence the question of possession by the defendant would have to be decided on the pleadings and evidence let in by the parties; and that there was absolutely no evidence as to when the plaintiffs started claiming title adversely to that of the defendant.

9. It is further argued by the learned Senior Counsel that it was specifically averred by the plaintiffs that the appellant/defendant failed to pay Rs.500/- to his sister as per Ex.B1 settlement deed and therefore allowed the property to be managed and enjoyed by the first plaintiff, and under such circumstances, the first plaintiff and her family members viz. plaintiffs 2 to 6 started enjoying the property as that of their own openly without interruption of any one all these years; that having rejected the said plea, the first appellate court should not have held that the plaintiffs have acquired title by adverse possession; that a reading of the evidence of P.Ws.1 and 2 would clearly indicate that their evidence was contradictory in nature regarding the possession of the property; that the first appellate court has wrongly found that the possession of the suit property was given to the plaintiffs on 7.8.1954 which is contra to the evidence of P.Ws.1 and 2; that regarding his possession, the third plaintiff has stated in the chief examination that he was in possession for three decades, but at the time of cross examination, he has stated 12 to 15 years; that the documents under Exs.B6, B15 to B39 would clearly establish that the defendant was always asserting his title to the suit property to the knowledge of the plaintiffs, and the plaintiffs have also recognised the title, and thus, the plaintiffs have not established that they had acquired title by adverse possession; that the trial court has given a well considered judgment, and under such circumstances, the first appellate court should have confirmed the same, and hence, for all the reasons, the judgment of the first appellate court has got to be set aside, while the judgment of the trial court has got to be restored.

10. Countering to the above contentions of the appellant's side, the learned Senior Counsel Mr.T.Mani, appearing for the respondents would submit that the trial court without considering the rival pleadings and the evidence, both oral and documentary has come to the wrong conclusion that the plaintiffs did not prove the adverse possession and dismissed the suit, and on appeal, the learned District Judge has taken a correct view, set aside the judgment of the trial court and granted a decree in favour of the plaintiffs as prayed for; that from the available evidence, it would be very clear that the plaintiffs, who entered into possession of the property in the year 1954 have

been in continuous possession for more than three decades; that by continuous, open and uninterrupted possession, they have perfected title by adverse possession; that the respondents/plaintiffs by sufficient evidence have substantiated their continuous possession without any interruption; that the evidence of the Commissioner and the report and plan marked as Exs.C1 and C2 respectively would clearly establish that the plaintiffs were in possession of the property and in enjoyment of the same; that the first appellate court was perfectly correct in rejecting the inland letters alleged to have been written by the plaintiffs 2 and 5; that it is pertinent to note that those documents or the writings therein were not at all proved by the defendant; and that mere production of those documents would not be sufficient and cannot be taken as a proof of the contents thereof.

11. Added further the learned Senior Counsel that it is an admitted position that the appellant/defendant was settled at Bangalore for so many decades, and the plaintiffs were in continuous possession of the suit property from the time of the death of Arumuga Naicker, and thus, the case of the defendant that he permitted his sister, the first plaintiff to look after the property was an utter falsehood, which was rightly rejected by the first appellate court; that the defendant who was in Bangalore, could not pay the amount to the first plaintiff, as found in the settlement deed, and under such circumstances, the plaintiffs began to enjoy the property as that of their own without any interruption for more than three decades; that the respondents/ plaintiffs were in complete control and enjoyment of the property openly, continuously and without any interruption whatsoever for more than the statutory period, and hence the judgment of the first appellate court has got to be confirmed.

12. In support of his contention, the learned Senior Counsel relied on two decisions reported in AIR 1974 MADRAS 257 (KARUPPANNA THEVAR (DIED) AND OTHERS V. RAJAGOPALA THEVAR AND OTHERS) and AIR 1978 MADRAS 78 (DORAISWAMI V. RATHNAMMAL AND OTHERS)

13. Admittedly, Arumuga Naicker, who became entitled to the suit property by devolution, made a registered settlement deed dated 7.8.1954 , marked as Ex.A1. Among the several covenants, the settlee, the appellant/defendant was directed to pay Rs.500/- to each of his three sisters, including the first plaintiff. The respondents filed the suit for declaration that they have prescribed title to the suit property by adverse possession and for consequential permanent injunction to restrain the defendant from interfering with the peaceful possession and enjoyment of the suit property. The suit was contested by the defendant by alleging interalia that the first respondent was only managing the property on behalf of the appellant/defendant and hence, the case of the plaintiffs seeking declaration of title based on adverse possession has to be rejected. The trial court has found that the plaintiffs had not proved their case and dismissed the same. On appeal, the first appellate court has reversed the judgment.

14. After careful consideration of the available materials and the submissions made by the respective learned Senior Counsel, the court is of the view that the first appellate court should have confirmed the findings of the trial court and should have dismissed the suit.

15. At the outset, it has to be stated that the words "adverse possession" would imply the actual possession of other man's land with intention to hold it and claim it as his own. It should commence with

wrongful dispossession of the rightful owner at specific point of time. It should commence in wrong and should be maintained against the right. It should be actual, open, hostile under claim of right, continuous and conclusive and maintained more than the statutory period. Needless to say that it is well established proposition of law that a person who claims title by adverse possession to a property of another, he should prove that he has been in enjoyment of the property in question for more than 12 years without interruption; that his possession was to the exclusion of all the persons; and that the said possession must be open and hostile to the true owner. The adverse possession should be nec vi, nec clam, nec precario i.e. for the prescription of the title, the possession required must be adequate in continuity, in publicity and extent. It would not be suffice to prove the actual and continuous possession for more than a statutory period, since it is one among the other ingredients of adverse possession. There should be necessary animus on the part of the person who intends to perfect his title by adverse possession. A firmly established principle of law is that a person who bases his title on adverse possession, must show by clear and unequivocal evidence that his possession was hostile to the real owner and amounted to a denial of his title to the property claimed. In the instant case, if this test is applied, the court is afraid whether it could accept the case of the plaintiffs.

16. Though the plaintiffs have claimed that they have perfected title to the suit property by adverse possession, the court is of the considered view that not only the pleading in the plaint, but also the evidence stood contra to their own case. It would be more appropriate to reproduce the relevant averments in the plaint as follows:

"The defendant herein was not only failed in paying the amount to the first plaintiff herein but also expressed a feeling that the suit property can be managed and enjoyed by the first plaintiff herein."

This part of the pleading would clearly indicate that the defendant due to his continuous stay at Bangalore has expressed to the first plaintiff that the suit property could be managed by her. From the available evidence it would be clear that the suit property is a vacant site and the first respondent/first plaintiff was residing in the adjacent property. It is an admitted position that the first respondent and her family members viz. plaintiffs 2 to 6 have been enjoying the suit property all along these years. But this by itself would not be suffice to constitute an adverse possession.

17. The defendant has specifically averred in the written statement that the first plaintiff being the sister living next to his property, was asked to look after the same. In the course of the cross examination, PW1 has categorically admitted more than once that she was looking after the property on behalf of her brother, the defendant. In view of the candid admission of the first plaintiff, it cannot be held that the plaintiffs have perfected title by adverse possession. It can be well stated that the said admission stands a good proof of the defendant's plea that the first plaintiff was allowed to look after the property. Permissive possession cannot be an adverse possession. In the instant case, the plaintiffs have proved their continuous possession more than the statutory period, but nor have they proved that their possession was hostile to the real owner viz. the defendant and amounted to a denial of the title of the defendant. The learned Senior Counsel for the respondents brought to the notice of the court that the

defendant during the cross examination has given up the defence stating that he did not permit the plaintiffs to look after the property. At this juncture, it remains to be stated that it was the plaintiffs, who claimed title to the property by adverse possession. In the instant case, in view of the averments in the plaint, the evidence of P.W.1 and other materials available, it would be abundantly clear that the plaintiffs have not proved their case.

18. The defendant has relied on Exs.B9 to B14 which were inland letters written by the plaintiffs 2 and 5, which asserted and recognized the title of the defendant to the suit property. The learned Senior Counsel appearing for the respondents would urge that these documents should not be relied on in evidence, since they were not properly proved. This contention of the respondents' side cannot be countenanced for the simple reason that those documents were produced by the addressee viz. the defendant, to whom they were written and who was expected to be in custody of the same. These documents were marked through D.W.1, who has clearly spoken to the fact that those documents were written to him by the plaintiffs 2 and 5. It is pertinent to note that not even a suggestion was put to D.W.1 denying the same. Under the stated circumstances, no adverse inference could be drawn against the defendant for not examining the plaintiffs 2 and 5, and hence, the lower appellate court was also not correct in rejecting Exs.B9 to B14.
19. Concedingly the said Arumuga Naicker, the owner of the property in question, executed a settlement deed bequeathing the suit property to the defendant, but has imposed a condition that he should pay Rs.500/- to each of his three sisters viz. Audilakshmi Ammal, Amirthavalli Thayarammal and Pushpavalliammal. Claiming title to the property by adverse possession, the plaintiffs have specifically averred that the payment of Rs.500/- to each of the sisters including that of the first plaintiff was a condition prece dent, and apart from that it was a pious obligation involved; that the defendant has thoroughly failed in paying the amount to the first plaintiff; and that since the defendant could not pay this amount, the first plaintiff and her family members viz. plaintiffs 2 to 6 started enjoying the property as that of their own property without interruption of any one in all these years. The first appellate court, in view of the available evidence, rejected this plea and has found that there was payment of Rs.500/- as stipulated in the settlement deed. Hence the contention of the respondents/plaintiffs' side that in view of the non payment of Rs.500/- as stipulated in the settlement deed, they started enjoying the property as their own property cannot be accepted. Taking into consideration all the above, it has to be necessarily held that the plaintiffs who claimed title to the property by adverse possession have miserably failed to prove the same, as required by law. Therefore, the judgment and decree of the first appellate court are liable to be set aside, and that of the trial court are confirmed.

20. In the result, this second appeal is allowed, with costs. The judgment and decree of the first appellate court are set aside. Consequently, connected CMP is closed.

M.CHOCKALINGAM, J.

Index: yes/no
Internet: yes 8-32002

nsv/

To:
1.The III Additional Judge,
City Civil Court,
Chennai.
2.The II Assistant Judge,
City Civil Court,
Chennai.

S.A.No.684 of 1992
and
CMP No.6547 of 1992